Office Supreme Court U.
FILED
OCT 8 1900
JAMES H. McKENN

No. 34.

Br. of J. H. McGowan & Kellogg for

# Supreme Court of the United States

Filed Oct. 8, 1900.

OCTOBER TERM, A. D. 1900.

---

No. 34

---

FRED HEWITT,

Plaintiff in Error.

vs.

EMIL SCHULTZ AND
FRIEDERIKA SCHULTZ,

Defendants in Error.

---

## BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

---

J. H. McGOWAN,
JAMES A. KELLOGG,
C. D. AUSTIN,
Attorneys for Plaintiff in Error.

## SUMMARY IN ORDER OF DATES.

1864. July 2. Original grant to Northern Pacific.—13 Stat. 365.

1870. May 31. Joint resolution making a second indemnity belt.—16 Stat. 378.

1872. Mar. 30. Map of *general* location filed and order of withdrawal made. (Rec. p. 31.)

1873. June 11. Map of *definite* location filed and alleged executive order of withdrawal made. (Rec. pp. 32, 33.)

1882. April 10. Hewitt settled upon and improved the tract involved. (Rec. p. 40.)

1882. July 12-27. Township surveyed. (Rec. p. 41.)

1882. Oct. 13. Plat of survey filed at Fargo. (Rec. p. 41.)

1882. Nov. 2. Hewitt filed his D. S. No. 11747 at Fargo. (Rec. p. 40.)

1883. Mar. 19. Railroad Co. filed at Fargo list of selections "in bulk" embracing the tract in controversy. (Rec. p. 34.)

1883. Apr. 4. Hewitt submitted final proof and tendered government price. (Rec. p. 40.)

1883. Apr. 9. Certificate of Register and Receiver Fargo Land office to list of selections. (Rec. p. 35.)

1883. May 28. Circular of instructions issued by H. M. Teller as to adjustment of the grant. (Rec. p. 35.)

1884. June 21. Defendants purchased the land while Hewitt was in possession; ousted Hewitt from possession. (Rec. p. 42.)

1885. Aug. 4. Lamar issued circular of instructions requiring "tract for tract" selection. (Rec. p. 36.)

1887. Aug. 15. Order revoking all alleged withdrawals of indemnity lands. (Rec. p. 33.)

1887. Oct. 12. Company specified basis for Mch. 19, 1893, list. (Rec. pp. 36–37.)

1888. Sept. 25. Commissioner allows Hewitt's final proof and holds company's selection for cancellation. (Rec. pp. 40–41.)

1892. Feb. 23. Company filed a re-arranged list—"tract for tract" selection. Tract in controversy selected for S. E. 21–44–9, Wisconsin. (Rec. p. 37.)

1894. Aug. 11. Secretary affirms Commissioner's decision and cancels company's selection. (Rec. p. 42.)

1894. Nov. 30. Hewitt paid for the tract and received the final certificate from the Register and Receiver.

1895. June 22. Patent issued to Hewitt. (Rec. p. 42.)

1895. Nov. 14. Secretary decided that the Company was not entitled to any lands East of Superior City, Wisconsin. (Rec. p. 38.)

1895. Nov. 26. Company specified as a new basis for its selection of the tract in controversy, the N. E. 1-3-33, Montana. (Rec. pp. 38-39.)

# Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No.....

FRED HEWITT,

Plaintiff in Error.

VS.

EMIL SCHULTZ, ET AL.,

Defendants in Error.

## BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

### STATEMENT.

This case comes here from the Supreme Court of the State of North Dakota. It is a case in ejectment commenced in the District Court for Sargent County and tried before the District Judge without a jury, judgment being rendered for the plaintiff. The facts were stipulated, and found by the court exactly as stipu-

lated, and are set out in the record on pages 44 to 59 inclusive.

They show in substance, that the plaintiff, Hewitt, settled upon the northeast quarter of section thirteen (13) in township one hundred and thirty two (132) north, of range fifty seven (57), west of the Fifth Principal Meridian, on the 10th of April, 1882, and improved the tract with the determination to secure the same under the preemption laws; that he was duly qualified to acquire lands under said laws, and November 2, 1882, presented to the Register and Receiver of the United States Land Office at Fargo, his declaratory statement, which was duly received and numbered 11747 and receipted for and placed among the records of said office (Finding X Rec. p. 56); that he resided upon and cultivated the land as required by law from this said 10th day of April 1882, to the 4th day of April, 1883, when he submitted final proof and tendered payment as required by law, which proof and tender was rejected by the Register and Receiver, assigning as a reason therefor that the land had been withdrawn from entry under the grant to the Northern Pacific Railroad Company made by the act of July 2, 1864; that he appealed from such rejection to the Commissioner of the General Land Office who affirmed the decision of the District Land Office October 2, 1883 (Finding XI Rec. p. 56), but afterwards in September 1888, upon a motion for a review, set aside said affirmatory decision, and ordered that Hewitt's final proof should be

admitted on the ground that there had been no legal withdrawal of the lands within the indemnity limits of said road, wherein the land in question was located, and directed that the alleged selection which the Company made March 17, 1883, should be cancelled (Finding XI Rec. pp. 56–57).

The railroad company appealed from this decision to the Secretary of the Interior, who, by his decision of August 11, 1894, affiirmed the decision of the Comissioner, and subsequently, to-wit; June 22. 1895, a patent for the tract was duly issued to the plaintiff in error, (Finding XI Rec. p. 58).

The findings of fact further show that following the grant to the Northern Pacific Company of July 2, 1864, (13 Stat. 366) the Company filed its map or general location March 30, 1872, (Finding IV Rec. p. 47) and map of definite location June 11, 1873 (Finding V Rec. p, 48) ; that upon filing the map of general location the Secretary directed the withdrawal from sale, location, etc., of the odd numbered sections of land falling within 40 miles on either side of said line, (Finding IV Rec. p. 47) and upon the filing of the map of definite location, the acting Commissioner of the General Land Office under date of June 11, 1873, directed the withdrawal from sale, etc., of the odd numbered sections that should be found within 40 miles on either side of this line, being the lands within what is termed the granted limits, and also the withdrawal of the odd-numbered sections lying between the forty

and fifty mile limits, that is, within the indemnity belt (Finding V Rec. p. 49). During the month of July, 1882, the township embracing the tract in question was surveyed, and Oct. 13, 1882 the plat of survey filed in the Fargo Land Office. (Finding XI Rec. p. 57).

On March 16, 1883, (Finding VII Rec. p. 50) the railroad company filed at Fargo its first list of selections, which list was in bulk embracing all the odd-numbered sections within the indemnity limits in said land district and without designating any corresponding losses within the granted limits. The tract in question was embraced in said list.

At the time of filing said list of selections, and for a long time previous thereto, the land department requited a statement of losses in place to accompany the list of selections—designating losses and selections "tract by tract." But something more than two months after said list was filed, the secretary issued a circular of instructions in which the local officers were to be directed "that when clear lists of selections free from conflict or other objection," were filed with and approved by them, they should be sent to the General Land Office, which office was to ascertain the land lost in place, "instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract from the company as *heretofore.*" (Finding VII Rec. p. 52.

On June 21, 1884, while Hewitt was in possession cultivating and improving the tract, the

railroad company made the alleged sale to one of the defendents in error, Emil Schultz, who proceeded to oust Hewitt, and has since kept the possession of the premises. (Finding XIII Rec. p. 58).

On the 4th of August, 1885, the secretary (Lamar) issued a circular of instructions directing that before admitting railroad indemnity selections in any case the local officers should "require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed;" "should then carefully examine their records tract by tract, to ascertain whether the loss to the grant actually exists as alleged, and directing that no indemnity selection should be admitted, without a proper basis therefor." If the local officers were in doubt whether the company was entitled to indemnity for losses claimed, they were to transmit the lists to the General Land Office for instructions. (Finding VII Rec. p. 52).

When indemnity selections had theretofore been made without specification of loss, the companies were required to designate the deficiencies for which such indemnity was to be applied before the selection would be allowed. The selecting agent was required to state under oath that the specified losses for which indemnity was claimed were truly set forth and described in said list, and that said losses had not theretofore been indemnified in any manner. The instructions also required that "the lieu selections must be made from vacant unappropri-

ated land within proper sections and limits NEAREST THE GRANTED SECTIONS IN WHICH THE LOSS OCCURRED." (Finding VII Rec. p. 52.)

On the 15th of August, 1887, an order was duly issued by the Secretary of the Interior revoking the alleged order of withdrawal of the odd numbered sections within the indemnity limits issued by the Acting Commissioner on the 11th of June, 1873, (Finding V Rec. p. 49).

On the 12th of October, 1887, the company, not having withdrawn the "bulk list" of selections filed by it in the Fargo office on the 19th of March, 1883, filed a list of alleged losses within the place limits, designating an amount of lands equal to those set out in the latter list, but not setting out losses and selections tract for tract, (Finding VII Rec. p. 52), and more than four years later, to-wit, February 23, 1895, the company filed what is designated a "re-arranged list," in which was set out the lands said to have been selected by its list of March 19, 1883, and having therein set opposite each description so selected, the description of a tract of equal area said to have been lost from the grant in place, and opposite the tract now in question was described the SE ¼ of Sec. 21, T. 44 N. of R. 9, W of 4th P. M. Wisconsin. (Finding VII Rec. p. 53).

On the 14th day of November, 1895, the Secretary decided that the company was not entitled under the granting act to take lands in Wisconsin east of Superior City. Thereupon, on

November 26th, 1895, the company specified a new basis for the tract in controversy, being the NE ¼ of Sec. 1, T. 3 N. of R. 33, in the State of Montana, at the same time protesting its right under its grant to land east of Superior City (Finding IX Rec. pp. 54-55).

The VIII finding sets out a copy of an alleged certificate by S. W. Lamoreaux, Commissioner of the General Land Office, made May 2nd, 1896, stating that he had caused an examination to be made of the records of the office relative to the grant to the Northern Pacific Co. under the Acts of 1864 and 1870, and that the records showed that the lands excepted from and lost to said grant within its primary limits were 10,-624,746.27 acres, and that there were in the first indemnity limits not to exceed 7,065,523.49 acres which would be available when surveyed for selection, leaving a deficiency of 3,559,222.78 acres which could not be satisfied from the first indemnity. (Finding VIII Rec. p. 53.)

The findings further disclose that when Hewitt offered his final proof on the 4th of April, 1883, his improvements consisted of a frame house, 16 x 16 feet, stable 10 x 12 feet, and 20 acres of ground broken, the value being estimated at $350 (Finding XI Rec. p. 57); that on June 21, 1884, he was "residing upon and in actual possession of the tract and every portion thereof and had valuable improvements thereon" (Finding XII Rec. p. 58); that on the last named date Schultz made the alleged purchase from the railroad company and paid therefor $1200,

(Finding XIII Rec. p. 58), and that neither party has since attempted to sell their rights, or supposed rights, in the premises (Finding XIV Rec. p. 59).

The alleged selection has never been approved by the Secretary of the Interior or any official of the government nor has any department of the government ever made certification that the company was entitled to said tract or letters patent for the same, and the said alleged selection was duly cancelled by the Secretary on August 11th, 1884. (Finding VII Rec. p. 53).

A summary of facts and dates involved in this case arranged chronologically, will be found on the first pages of this brief.

It is thus disclosed by the stipulation and findings:

1. That Hewitt was qualified to take land under the preemption law of 1841, mentioned in the granting act.

2. That on his part and on the part of the land officers the requirements of that law were complied with up to and including the issue to him of the patent.

3. That he had settled upon the tract and improved it, and had filed his declaratory statement prior to any attempt whatever upon the part of the railroad company to select the same.

4. That Hewitt submitted final proof and tendered the government price of the land more than four years before the railroad company filed any list of losses as a basis for selecting the tract in question.

5. That before the company filed any list of losses in place as bases for selections, which selections included the Hewitt tract, the Teller circular of instructions had been replaced by the LeMar circular requiring a "tract for tract" selection.

6. That before the company filed any such list of losses the alleged order of withdrawal of the indemnity limits made by the Acting Commissioner, had been revoked by the Secretary of the Interior.

7. That the company specified the Montana tract as a loss in place for which it desired to select the land in question on November 26, 1895, but that Hewitt had paid for the land a year prior to that date, to-wit, Nov. 30, 1894, and the patent had issued to him five months prior, to-wit, June 22, 1895.

8. That the company's selection of the N. E. 13 T. 132, N. of R, 57 W. as a lieu tract, has never been approved.

We add here such portions of sections three and six of the original act making the grant to the Northern Facific as are necessary for reference in the argument.

Sec. 3. "And be it further enacted, that there be, and hereby is granted to the 'Northern Pacific Railroad Company', its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, mu-

nitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." * * * * *

Sec. 6. "And be it further enacted, that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or

preemption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty one, granting preemption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain' approved May twenty, eighteen hundred and sixty two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company, and the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

## ARGUMENT.

Plaintiff in Error Claims,

1. That his title to the land under his patent from the United States is valid and unimpeachable.

2. The Railroad Company had no right to or interest in this land which could limit plaintiff's right to acquire title.

3. The order of the Acting Commissioner of the General Land Office directing the Register and Receiver to withhold from sale or entry the odd numbered sections within the indemnity limits, was without authority and void.

4. That if such order should be found legal, it must still be held that it was liable to revocation either in whole or in part, and that after revocation, the odd sections, free from other claims were open to settlement.

5. That the Railroad Company never made a valid selection of the tract, the alleged selection was void, and the company has not now and never did have any title.

## I.

**Plaintiff's title to the land under his patent from the United States is valid and unimpeachable.**

The land was public land; it was subject to entry; plaintiff fully complied with the law in that regard, and his patent gave him full and complete title.

That the act making the land grant to the Northern Pacific Railroad Company did not in any respect obstruct the preemption of this land, is plain from the provisions of the act itself.

Section 6, after providing that the odd sections of land granted to the Railroad Company, meaning the lands within the "place limits" of the grant, "shall not be liable to sale, or entry,

or preemption, before or after they are surveyed, except by said Company, as provided in this act," goes on to further provide, affirmatively and industriously, as follows:

"But the provisions of the act of September, Eighteen hundred and Forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, Eighteen Hundred and Sixty- two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said Company."

The land department as well as this court have repeatedly held that "granted" lands as that term is employed in the granting act are those lands within the *place limits* and does not embrace "indemnity" lands or lands within the indemnity limits. One of the early decisions of the department upon that question was made by Secretary Lamar in *Atlantic and Pacific R. R. Co. 6 L. D. 84, 86, 87;* and a later case is *Northern Pacific Railroad Company vs Miller 7 L. D. 100.*

In the following case the Court designates "place" lands as "granted" lands.

"The companies were allowed to select, under the direction of the Secretary of the Interior, in lieu of the lands disposed of in either of these ways, an equal number of odd sections nearest to those *granted* and within twenty miles of the line of the road. Having thus given lands in place and by way of indemnity, Congress ex-

pressly declared, what the act already implied, that lands otherwise appropriated when it was passed were not subject to it."

*Leavenworth, etc., R. R. Co. v. U. S. 92, U. S. 733, 748.*

That part of Sec. 6 above quoted is an equivocal declaration of the will of Congress, that all other lands on the line of said road, besides those in the "place limits" which were *granted* to the Company, should be, when surveyed, open to settlement and entry under the pre-emption and homestead laws of the United States.

It seems too clear for argument, that in the same section of the act, Congress provided first, that "The odd sections of land hereby granted *shall not* be liable" to any other claims than those of the Company, and second, that all the other lands on the line of the road *shall* be liable to preemption or homestead entry. "All other lands on the line of said road" must of necessity include all the lands, both odd and even numbered sections, within the limits named in section 3 of said act, other than those *granted* to the company.

This positive assurance in the act of Congress is a bulwark against all the objections which ingenious counsel can raise to the patentability of the land in question. It broadly distinguishes this case from each and every one of those cited in defendant's brief, from which a contrary inference is sought to be drawn.

This court will look in vain for any well considered decision of a court, which even remotely suggests that the Land Department could in any way override or even embarass the right of pre-emption entry to land situated like that in this case.

This feature of the case lies at the basis of the decision of the Secretary of the Interior, in the case of *Northern Pacific Railroad Company vs. Miller, 7 L. D. 100.* In that case as in this, the land in question had not been granted to the Railroad Company by its charter, but was land within the indemnity limits named in the charter, as to which the company had only a contingent right of selection. Of this feature of the case, it was said by Secretary Vilas:

"The granting act did not only not authorize a withdrawal of lands in the indemnity limits, but forbade it. * * " (P 120) "It was explicitly provided that the provisions of the pre-emption and homestead laws 'shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company.' If the lands within the indemnity limits are to be regarded as 'on the line of said road', this declaration appears to me prohibitory of any withdrawal for the benefit of this road. * * * It gave to any person entitled under the pre-emption or homestead law to take any such lands, the absolute right to acquire any proper quantity thereof, in accordance therewith, and this right an executive officer could not deprive the settler of. The act as much makes that his right, as it makes it the right of the company to take the others." (p. 122)

The reasoning and the conclusions of this opinion are unassailable. Since it was pronounced by Secretary Vilas in 1888, it has stood as the law governing the action of the land department in all similar cases, and its rules have frequently been applied in contests before the Department of the Interior.

The Supreme Court of the United States justifies this conclusion of Secretary Vilas, when it says in a recent case:

"The action of the land department cannot override the expressed will of Congress."

*Burfenning vs. Ry Co., 193 U. S. 351.*

It will be seen that Secretary Vilas, in reaching his conclusion as above set forth, quoted liberally from the decisions of the Supreme Court of the United States, and an examination of these authorities shows that he made from them the proper deductions, and that they justified the conclusions which he reached. His decision in the Miller case was recognized as authoritive, and was followed by Secretary Noble in *N. P. R. R. Co. vs Fugelli, 10 L. D. 288* and *Spicer vs. N. P. R. R. Co., 10 L. D. 440.*

Later the decision in the Miller case has been examined anew by Secretary Smith, and has been expressly re-affirmed in *Davis vs. N. P. R. R. Co,, 19 L. D. 87* in which the language of Secretary Vilas in the Miller case was repeated and adopted, and Secretary Smith added:

"It would seem, therefore, to follow logically, when it was commanded that the pre-emption and homestead laws be extended to 'all other lands', it was all those lands within the limits of the grant, whict had not been otherwise disposed of by the act. The 'other' lands within the limits of the grant were the reserved sections, and the odd and even section, within the indemnity limits, and it is clear to my mind that Congress meant all of those lands, for 'all' other lands surely cannot mean only a portion of the other lands. *Qui omne dicit, nihil excludit,* is a maxim well recognized in the construction or statutes, and is applicable here."

Secretary LaMar so construed this feature of the granting act in *Atlantic and Pacfic Railroad 6 L. D. pp. 86-87.*

Secretary Smith further quotes from the opinion of Secretary LaMar, in the said case of the *Atlantic and Pacific Railroad, 6 L. D. 87* where the Secretary said of another grant in similar terms and with similar provisions:

"Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grants, I should at least have such doubts of the existence of any such authority as to have restrained me of its exercise. It would seem that the very words of the act, 'the odd numbered sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act,' of themselves indicate most clearly the legislative will that there should not be withdrawn for the benefit of said company from sale or entry any other lands except the odd numbered sec-

tions within the granted limits, as expressly designed in the act. But when the provision following this, in the very same sentence is considered—'but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'an act to secure homesteads to actual settlers upon the public domain,' approved May 20, 1862, 'shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company'—it is difficult to resist the conclusion that Congress intended that 'all other lands excepting those hereby granted to the company' shall be open to settlement under the pre-emption and homestead laws, and to prohibit the exercise in the matter of determining what lands shall or shall not be withdrawn." * * *

It is hardly necessary in this case to invoke the familiar rule for the construction of legislative grants: "Nothing passes by such but what is conveyed in the act making the grant in clear and unambiguous terms. Such a grant must be strongly construed against the grantee."

*N. P. R. R. Co. vs Sanders, 46 Fed. 239, 250.*

Counsel for defendants in error claim that without the withdrawal of June 11th, 1873, the right of selection would have been a barren right. That statement is not justified by law, and section 6 of the act of July 2nd, 1864, as we have seen, does not extend the right of pre-emption and homesteads to the indemnity lands until ***after the survey*** thereof; before the survey no rights can attach to these lands under the law, by settlement and improvement or other-

wise; as soon as the survey was made the company could select such of said lands as it might be entitled to, to indemnify it for losses in the "place limits," and the remainder of such indemnity lands, if any, become subject to entry as aforesaid.

If the company neglects to make selection of the indemnity lands at once after the survey, and the rights of settlers should intervene between the date of the survey and the date of the selection, who should suffer but the company? Is it not reasonble to require the company to select the indemnity lands immediately upon the survey, and in the event of its negligence in the exercise of that privilege if the rights of the settlers should intervene, should the company be heard to complain? Fully eighteen years elapsed between the date of the grant and that of the survey of the said township, and here was abundance of time to have ascertained and listed the losses in the place limits and been ready to have made the lieu selections at once. Congress, by Section 6 aforesaid, provided that ***when surveyed***, the indemnity lands should be immediately liable to selection by the company, and that the lands not previously selected should be appropriated to the first legal applicant under the pre-emption and homestead laws. The company did not make a pretended selection of the land in controversy until about nine months after the township was surveyed, and over five months after the plat of survey thereof had been filed in the local land office.

First come, first served. Prior in time, prior in right.

*Sheply vs Cowen, 91 U. S. 330.*
*N. P. R. R. Co., vs. Meyer, 9 L. D. 250.*

Patent relates to inception of the title, therefore, person first appropriating land has best title in equity.

*Taylor vs. Brown, 5 Cranch, 234.*
*Stark vs Starrs 6 Wall 402.*

Why should the Department of the Interior, even if it had authority, withdraw from settlement and entry the indemnity lands after survey, and withhold the same for an indefinite time, awaiting the pleasure of the company in making selections thereof? There is no reason for such action, and it would be manifestly unjust to the home-seeker, at well as a detriment to the welfare of the country, to tie up the whole of the indemnity lands to await the convenience or caprice of the company in making selections from the same.

The policy of withdrawing lands and withholding them for long terms from sale and settlement has long since become reprehensible to both the judicial and legislative authorities.

In speaking of the withdrawal of indemnity lands the Court says in *St. Paul R. vs Winona R 112 U. S. 720, 732.*

"It (the withdrawal) by no means implies a vested right in said company, inconsistent with the right of the goverment to sell, or of any

other company to select, which has the same right to selections within those limits. Each company having this right of selection in such cases, and having no other right, *is bound to exercise that right with reasonable diligence;* and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected. The unascertained float then becomes a vested right to an identified tract of land."

The observations of the Court in the case of *Northern Pacific R. R. Co. vs. Musser-Sauntry L. L. & Mfg. Co., 168 U. S. 604, 610,* are peculiarly applicable to the grant to the Northern Pacific Company and gives as a reason why promptness on the part of the company in building its road would result to its advantage in finding all its grant within the place limits. The Court says:

"At the time of the passage of the act of 1864 only in the vicinity of the proposed eastern and western termini were there any settlements. The great bulk of the territory through which the road was to pass was almost entirely unoccupied. Congress, fixing the time for commencing and for finishing the work within two and twelve years, respectively (section 8), contemplated promptness in the construction of the road, intending thereby to open this large unoccupied territory to settlement. In view of the road traversing a comparative wilderness, it made a grant of enormous extent. Within the unoccupied territory thus to be traversed there were few settlers, and few, if any land grants. It knew therefore, *that if the company proceeded promptly, as required, it would find within its place limits nearly the full amount of its grant.*"

It is against the settled policy of Congress that the indemnity lands should be withdrawn from entry by actual settlers, for an indefinite time.

*N. P. R. R. Co. vs Sanders, 46 Fed. 239, 248, 249.*

Even if the withdrawal had been valid it did not confer a vested right upon the Company.

But, whatever may be said as to the Congressional policy, it is only necessary here to observe that the legislative will seems clear. The principle followed by the Secretaries of the Interior Department, in their decisions above noted, must, it seems to us, prevail, to-wit, that the executive department cannot arbitrarily suspend the operation of the statutes, or contravene a distinct mandate of law. When Congress has legislated exhaustively and definitely as to the mode of disposition of indemnity lands, the executive department has no power to nullify such law. It having been enacted that the indemnity lands should be subject to entry *when surveyed* the action of the president in ordering such lands withdrawn from entry *after survey* would simply render the statute nugatory. The Interior Department, in the decisions above quoted, declines to suppose that any such power could be properly attributed to the Executive.

There, was then, no "proclamation of the President" reserving or withdrawing these indemnity lands from entry; and section *2258* of the U. S. statutes has no application to the case.

The sixth section of the granting act opens

the odd sections within the indemnity belt to preemption entry, when surveyed, as well as to selection, and that, as the said lands are appropriated to these two purposes, the land department cannot defeat either purpose by attempted withdrawals. If these lands are thus appropriated the following cases distinctly hold that the appropriation cannot be defeated.

*Wright vs. Rosbeberry, 121 U. S. 488, 519.*

*Davis Admr. vs. Weibold, 139 U. S. 509, 528.*

*In Moore vs. Curmode, 20 Wash. 805 (55 Pac. 217)* the court in a well considered case involving this identical withdrawal, held that indemnity land within the grant to the N. P. Company was subject to entry regardless of the departmental withdrawal, the Court saying:

"Under the land grant to the Northern Pacific Railroad Company (13 Stat. at Large, 365) of alternate sections for forty miles on each side of the line as located, and, in case of prior selection by settlers, granting the company the right to select in lieu thereof alternate sections from indemnity lands lying not more than ten miles beyond the original grant of place lands, the grant as to lands in the indemnity limits did not take effect until actually selected by the company, and prior thereto such lands *were open to settlement.*"

The land in question was, therefore, subject to entry, and plaintiff's patent must be sustained.

## II.

**The Railroad Company had no right or interest in this land which could limit Plaintiff's right to acquire title.**

As between the railroad company and ordinary settlers upon the public lands, the last named were preferred. The lands actually granted to the railroad company were assured to it in the utmost good faith; but beyond that, the privileges of the railroad company were subordinate.

Following the general policy of the United States Government in its grants of lands to railroad companies, the charter of this company, as to all public lands referred to in it, gave preference to the preemptors and homestead settlers, down to the time when "the line of said road is definitely fixed." (Sec. 3.)

Until such line was definitely fixed, the usual rights of preemption and homestead settlement and entry remained unaffected by the land grant. Upon the filing of the map fixing the line of the road, the law withdrew from settlement the granted lands situated within the place limits.

*Buttz vs. N P. R. R. Co., 119 U. S. 55, 71.*

The indemnity belt was created for the purpose of establishing limits, within which selections might afterwards be made to indemnify

the company for the lands which would become exempted from this grant within the original belt by reason of such other appropriation thereof. It would naturally follow that Congress would, as to the land within the indemnity belt, pursue the same general policy of preferring preemption and homestead settlers. Accordingly the act provides that the railroad company has, until its selection of indemnity lands within the indemnity belt no property or interest in any such lands, but only a power to make therefrom, under certain limitations, selections to meet the contingency of its losses within the granted limits.

This grant to the N. P. R. R. Co. is limited "to such alternate odd sections as have not, at that time (the definite location) been reserved, sold, granted, or otherwise appropriated, and are free from preemption, grant, or other claims or rights."

*Buttz vs. R. R. Co., 119 U. S. 55, 71.*

"Congress intended to give to actual *bona fide* settlers priority to the Railroad Company."

*Ry. Co. vs. Greenhalgh, 26 Fed. Rep. 563, 568.*

As to the land in the indemnity limits, that which was conferred upon the company by its charter was simply a privilege, contingent in its nature, to make, under certain limitations, selections for the purpose of indemnity. The act is devoid of any intent to give to the Railroad Company any right or interest in any of the indemnity lands prior to such selection, and be-

fore any right attaches to a special tract the selection must not only be actually made by the company, but affirmatively approved by the Secretary of the Interior.

It is scarcely necessary to argue, or to cite authorities to show that this right of the Railroad Company was merely a power, which required actual selection in conformity to the prescribed conditions and limitations, in order to vest any right in the company. But authorities are not wanting.

*In Grandin vs LeBar, 57 N. W. 243* the Court says:

"But this privilege did not constitute a present grant. It vested in the Railroad a right through and by which, in the contingency specified, it might acquire title to the additional or indemnity lands."

"The selection segregates the land, and, if approved, cuts off all claimants ***subsequent to such selection.*** But it does not pass title. A grantee cannot pass title to himself. ***This grant, as we have seen, did not pass title. It gave only a right to select.*** It requires the ***approval*** of the selection to pass title. It will not do to say the selection itself, where the land is subject to selection and a corresponding loss exists, passes title. The law does not so declare and land titles must not rest upon a foundation so uncertain."

I should analyze the provision of the granting act relating to selections in the indemnity limits somewhat diffierently, but reaching practically the same conclusions.

The word "selected" or, to give it the nomi-

native, "selection" embraces everything to be done in the premises by the railroad company and the Secretary. It is "the selection" in this broader sence that is meant and that determines the title in the company.

First, the company must determine the losses by tracts, i. e. by the "sections or parts of sections" and record or list them. This would be necessary to prevent frauds. If the particular tracts alleged to be lost were not so described that they could be identified, the Secretary could not determine whether or not the losses had actually occurred. He could not give the required "direction."

Second, the tracts chosen by the company in lieu of the losses, must also be described and listed, or the Secretary cannot determine whether or not they are free from other appropriation.

Third, and finally, these lists must be examined and approved "under the direction of the Secretary of the Interior."

These three elements uniting, the "selections" is complete and the title passes to the company. The action of the Secretary is as necessary as that of the company, and there is no "selection" within the purview of the statute until the listing of losses and the listing of the tracts chosen in lieu have the stamp of his approval, officially denoting that all has been done under his direction. His acts in this regard are judicial, and

his judgment in favor of the company binds the government. It also binds the grantee.

As a striking illustration of the neccessity of a "tract for tract" selection, I call attention to the statement made by Secretary Vilas in the Guilford-Miller case found on page 124. It will be seen that the Northern Pacific Co. made a selection of lieu lands aggregating 58,000 acres without specifying losses. Of this selecting the Secretary states that when the Company, some years afterwards, was called upon to specify particular lands lost from the granted limits, for which this right of selection could exist, only 4,011 acres were shown, except by claiming in-d emnity for about 55,000 acres of lands, for the most part not particularly defined, lying within the *Wakima* Indian Reservation. After showing that this particular Indian Reservation might or might not fall within the primary limits when the grant was finally adjusted, the Secretary calls attention to the decision in *Buttz v. Northern Pacific R. R. (119 U. S. 71)* wherein it is held that Indian Reservations in this grant are not excepted out of the grant and the lands pass to the Company *in fee*, subject to the Indian right of occupancy, which the Government will at is pleasure extinguish.

The Secretary further says, in discussing this matter of selection, that there was a practice permitted for sometime in the General Land Office, by which Railroad Companies made selections in lieu of lost lands without the specification of specific losses, and by this means pro-

cured certification of lands much in excess in acreage of their losses for which selections were admissable. I do not understand that the Teller circular of May 28, 1883, could, if properly administered, have led to any such result. It would appear that the Secretary, in that circular, had in mind only to expedite the adjustment of the grant, but not to waive his right of supervision of selections and losses, "tract by tract." The circular simply undertakes to put a portion of the work of selection upon the land officers, a portion that had theretofore been required of the Company; and there is no evidence in the record wherein lists filed under this circular was approved without the corresponding losses having been ascertained and compared and the completed selections thus made up had the approval of the Secretary.

But this matter is so fully and effectually disposed of by this court in *Wis. Cent. R. R. Co. v. Price County, 133 U. S. 496, 511, (33 L. ed 687)*, that further discussion is unnecessary. Justice Field announced the opinion of the court, and in referring to the selection of lieu lands under a provision of the grant requiring such selections to be approved by the Secretary of the Interior, he says:

"For such lands no title could pass to the company, not only until the selections were made by the agents of the State appointed by the Governor, but until such selections were approved by the Secretary of the Interior. The agent of the State made the selections, and they had been properly authenticated and forwarded

to the Secretary of the Interior. But that officer never approved of them. Nor can such approval be inferred from his not formally rejecting them."

The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land grants to the company which were to be supplied from indemnity lands; and in the second place, whether the particular indemnity lands selected could be properly taken for these deficiencies. In order to reach a proper conclusion on these two questions he had also to enquire and determine whether any lands in the place limits have been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and, if so, what portion had been thus appropriated, and what proportion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their land. Until the selections were approved there were no selections, in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed,

under a promise to give the Company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. The doctrine, that until selection made no title vests in indemnity lands, has been recognized in several decisions of this court."

The court further cites—*Sioux City & St. P. Co. v. C. M. & St. P. Co., 117 U. S. 406, (29 L. ed 928)* as follows:

"No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior."

Also the opinion of the Attorney General in—*Lighthouse Site and Portage Land Grant*, found in *14 Ops. Atty-Gen. 50 & 645*, declaring:

"The uniform language is that no title to indemnity lands becomes vested in any company or in the State until the selections are made; and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior."

Also see *U. S. vs. Missouri etc. Railway, 141 U. S. 358, 375*, and list of cases therein cited:

"* * *Because as to lands which may legally be taken for purposes of indemnity the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but in the fullest legal sense, remains in the United States, until they are actually selected and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes. It

was so held in *Kansas Pacific Railroad vs Atchinson, 112 U. S. 414, 421,* in which the court, referring to the above act of 1863, said in reference to the lands in the indemnity limits: 'Until selection was made the title remained in the government, subject to its disposal at its pleasure. * * * The grant to Kansas, as stated conferred only a right to select lands beyond ten miles from defendant's road, upon certain contingencies. It gave no title to indemnity lands in advance of their selection.' The same principle was announced In *Barney vs. Winona & St. Peter Railroad, 117 U. S. 228, 232,* where the Court said: 'In the construction of land grant acts in aid of railroads, there is a well established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection.' So in *Sioux City etc. R. R. vs. C. M. & St. P. Ry., 117 U. S. 406, 408:* 'No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection approved by the Secretary of the Interior.

This court in construing a charter in effect the the same as the granting act of the N. P. Company in the case of *Regan v. Railroad Co., 99, U. S. 382, 386* said: "under this statute, when the road was located and the maps were made, the right of the company to the odd sections first

named became *ipso facto* fixed and absolute. With respect to the "lieu lands", as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed."

Upon the proposition that no rights vested in the Company as to any specific tract of indemnity land before selection and approval see:

*Kansas Pacific R. R. Co. vs Atchison etc R. R. Co. 112 U. S. 414 (28 L. ed. 794.)*

*St. Paul etc., R. R. Co. vs Winona etc. R. R, Co.,112 U. S. 720, 731, 732, (28 L, ed. 872)*

*Barnes vs Winona etc. R.R.117 Co. U. S. 228*

*Grandin vs. La Bar, 57 N. W. 241, 243.*

*Wells County vs McHenry, 74 N. W. 241, 242.*

*Jackson vs La Moure County, 46 N. W. 449 (1 N. D. 238).*

*Moore vs Cormode, 20, Wash. 305, (55 Pac. 217),*

## III.

**The Order of the Acting Commissioner of the General Land Office directing the Register and Receiver to withhold from sale or entry the odd numbered sections within the indemniy limits, was without effect to bring the case within section 3258 of the revised statutes.**

Defendant insists that the plaintiff's patent is void, because of the order of withdrawal of the indemnity lands. The argument upon this point seems to be a *petitio principii*. It assumes that the order of withdrawal by the Acting Commissioner of the General Land Office, was a proclamation of the President, within the meaning of section *2258* of the Revised Statutes of the United States, and that the Acting Commissioner had power to promulgate such order. But this is assuming the very proposition which it is incumbent upon the defendants to prove, to-wit: that the President or any of his subordinates had authority to make such order.

Section *2258* names, among classes of lands which are not subject to the rights of preemption, the following: "First. lands included in

any reservation by any treaty, law or proclamation of the President for any purpose."

It is necessarily inherent in this provision of the statute that the treaty named must be one made by a competent constitutional authority, that the law named must be one made by Congress within its constitutional power, and that the proclamation of the President must be one which he has authority to make. If the President makes such proclamation without constitutional authority, it would be void. In the present case, is is fundamental to defendant's contention, that they shall show an order of withdrawal of the indemnity lands, made by Executive authority, and ***within the constitutional limits of Executive authority***. An order of the President, in direct violation of an act of Congress, would be ineffectual for any purpose.

We have seen in section **6** of the company's charter, a positive declaration by Congress, that the indemnity lands shall be subject to preemption. Where then can the Executive find authority or power to declare otherwise? To say, as defendant claims, that the land in controversy herein " is land included in a reservation by proclamation of the President", is to ignore the constitutional limits upon the Executive authority.

Among the abundant authorities cited by defendants, in support of their proposition, not one is found which involves the question here presented. In none of those authorities was there any question presented of an attempt by

the Executive authority to declare a withdrawal of lands from entry, in contravention of a provision of law of Congress.

The question of the general authority of the officers of the Land Department, to withdraw public lands from the act and operation of the general *law where there is no positive requirement of* Congress involved, is quite a different question from the one here presented. If the action of that department be in aid and affirmation of, and not in direct contravention of the declared legislative policy, different considerations would apply. In such cases, they might and would really sustain the Executive action. It is a part of Executive duty to execute the laws of Congress. In cases of doubt, it is not only proper but becoming that the Executive officers should so act as to effectuate the plain intent of the Legislature. It is out of decisions of the courts which have sustained the action of the Executive officers in such cases, that defendants endeavor to erect a bulwark for their proposition that the Executive may defy and nullify the positive provisions of an act of Congress.

Thus in *Wolcott vs Des Moines Co,, 5 Wall, 681,* there was no affirmative statutory require ment as in this case, and the order of withdrawal of lands from entry was sustained on the ground of doubt arising out of a *serious conflict of opinion* as to the longitudinal extent of the grant.

*Woolsey vs Chapman; 101 U. S, 755,* and *Riley vs Welles, 154 U. S. 578* resemble and are governed by the case of *Woolcott vs Des Moines Co.*

*In Spencer vs McDougal, 156 U. S. 52,* there was no statute forbidding the withdrawal, and the order of withdrawal in question was sustained upon similar grounds the doubts arising in view of the probable conflict of rights from the overlapping of two grants on lines yet undetermined. The only objection to the order in that case being that the commissioner withdrew too much land, and it was held that this was a matter within the discretion of the land office.

*In R. R. Co vs Logging and Man'fg. Co., 163 U. S. 604, (18 Supreme Court Rep. 205,)* no question was presented of a statutory prohibition. The case was one of an ordinary withdrawal of indemnity lands from entry.

*In Wood v Beach 156 U. S. 548* cited by defendants on page 15 of their brief the withdrawal was made *under the direction of congress.*

In the recent case before Judge Thomas, *Thompson vs Railroad Co., 83 Fed. Rep. 546,* the question arose, not under the act of 1864, which is under consideration in this case, but under the resolution of Congress approved May 31, 1870, creating the *second* indemnity belt of of the N. P. R. R. Co. (16 Stat. 378.) This resolution contains no prohibition, either expressed or implied, against withdrawal, such as is found in the charter of 1864, respecting the land

in the *first* indemnity belt. The question here presented of course could not arise there. There having been an order of withdrawal on December 26, 1871, by the Commissioner of the Land Office, of the odd numbered sections in the indemnity limits, it was held that the withdrawal was valid as to the land in question, which lay wholly within the *second* indemnity limits created by the resolution of 1870.

A comparison between the language of section 6 of the charter of 1864, and that of the resolution of May 31, 1870, will show the difference in congressional policy as between the first and second indemnity limits. Not a word appears in the said resolution either in terms like the prohibition in section 6 of the charter of 1864 or implying anything similar. It is clear that Congress in 1870 conferred much larger privileges upon the railroad company, with respect to the lands within its second indemnity belt than were conferred upon it with respect to the lands in its first indemnity belt.

The decision of Judge Thomas is therefore entirely consonant with the view of Brewer J., in ***R. R. Co, vs United States, 36 Fed. Rep. 282,*** that the resolution of 1870 granted to this company privileges additional to and broader than those granted in the charter of 1864.

The attempt in defendant's brief to discover a conflict between the decision of Secretary Vilas in the *Guilford-Miller case 7 L. D. 100,* and that of Judge Thomas in *83 Fed. 546,* is not successful.

In fact the decision of Secretary Vilas in the Miller case stands unaffected by any judicial decision that has been brought to our attention.

IV.

**That if such order of withdrawal should be found legal, it must be held that it was liable to revocation, either in whole or in part, and that after revocation, the odd sections, free from other claims, were open to settlement.**

Assuming for the sake of argument that the Executive had the authority to withdraw the indemnity limits prescribed in this grant it will not be seriously denied that he had equal authority to revoke such order of withdrawal whenever he deemed the interests of all parties concerned required such revocation. Certainly from the date of such revocation the odd numbered sections, then free from claims, would be subject to selection by the railroad company, or subject to settlement or other claims exactly as if no withdrawal had been made.

*Atlantic and Pacific R. R, Co. 6 L, D, 84,*

On the 15th of August, 1887, an order was duly made by the Secretary, revoking all alleged withdrawals of indemnity lands, and on September 25th, 1888, the Commissioner allowed Hewitt's final proof and held the company's selection for cancellation, which decision was affirmed by the Secretary, and the selection finally cancelled August 11, 1894. Now when the revocation order was made, Hewitt's claim as a settler was pending, he had theretofore settled upon the tract, improved it, filed his declaratory statement, submitted his final proof, and tendered the Government price in payment for the land, and up to this date there had never been any *selection* made by the company as provided by the granting act. In fact the company never initiated any proper and legal selection of this land, as the law and the regulations required, until more than four years after the revocation of the alleged withdrawal; to-wit, on February 23, 1892, when it filed the so-called "rearranged list", being a "tract for tract" selection, which furnished as the basis for selecting the Hewitt tract a loss of similar amount in the state of Wisconsin, and subsequently, upon the decision of the Secretary that the company was not entitled to land east of Superior City, there was filed, Nov. 26, 1895, a new basis for the selection of the tract in controversy,—being the N. E. ¼ of Sec. 1, T. 3, R. 33, Montana. It is a fact then

that when Hewitt paid for the tract and received his final certificate from the Register and Receiver on Nov. 30, 1894, the alleged withdrawal had been revoked, the company's alleged selection had been cancelled, and so far as the Executive had the power to do so, the land was entirely free from any claim other than that of plaintiff.

It must go without saying that the Secretary had the power to revoke any withdrawal which he had made, and equally had the power to cancel any alleged selection that did not conform to the statutes and the proper regulations thereunder. This being true, it must be clear that from the time when the tract in question was free from any shadow of claim on the part of the Railroad company the whole question of its acquirement was between the settler and the Government,—a matter in which the company had no voice.

Hence, having conceded, for the purposes of argument, that Hewitt could not have initiated a legal settlement upon the land in 1882, yet when the land was entirely free and he was found upon it asserting his rights in good faith having complied so far as he could with the requirements of the pre-emption law, the Secretary could direct, under the equitable jurisdiction conferred upon him, that the claim be allowed and patent issued.

There is another view of this matter that should have consideration. It is this: If the power rested in the Secretary to revoke a with-

drawal, he certainly could revoke it, in whole or in part. It is undoubtedly true that in the administration of railroad grants it would frequently conduce to the ends of justice to revoke a part of an order of withdrawal, but allow it to stand as to other portions of the line. If this may be done, there would be no limit in area as to the portions that might be freed from the withdrawal, or the portion allowed to remain under it. If the Assistant Commissioner map bind the Secretary and the President in an order of withdrawal, I submit that theaction of the Register and Receiver in accepting the declaratory statement of Hewitt, giving his claim a number giving him the usual receipt in such cases, placing his application among the records of their office and reporting the same to the Commissioner of the General Land Office, where it remained without cancellation and without objection,—was equivalent to withdrawing the tract in question from the effect of any former withdrawal resting upon it. In this connection I call attention to the fact that Hewitt settled upon the land before it was surveyed and he filed his declaratory statement a few days after the plat of survey had been filed in the local office, and that these things took place before the railroad company took *any steps whatever* looking to the selection of the land.

*In Railroad Co., vs Araiza 57 Fed. 102* it is said: "It is true the order of withdrawal made by the secretary on the 27th of March, 1867, had not been in terms vacated, but the secretary had the same power to vacate it that he had to make

it; and when he permitted Tilley to make his entry, and awarded the land in question to him, and issued him a patent therefore, he, in effect annulled the order of withdrawal so far as that particular piece of land was concerned. In doing so he violated no vested right of the complainant, for to that land the company had not then acquired any right of any nature. It had not selected it and might never do so. There was, therefore, no legal reason why he should not allow homestead entry. The act making the grant to the complainant did not direct the secretary of the interior to make any order withdrawing the lands that might fall within it from sales, pre-emption, homestead entry, or other disposition, and did not prescribe the effect to be given to such an order. It is not for the court to say whether the secretary ought or ought not to have allowed the homestead entry while the general order of withdrawal remained unrevoked. It is sufficient for the purposes of this suit to say that in doing so he did not interfere with any legal right of complainant, for the simple reason that complainant had not then acquired any right to the land in controversy in the only mode it could acquire it, namely by selecting it."

In the Guilford-Miller case the final decision was not made in favor of the settler, and against the railroad company, until after the order of withdrawal had been revoked. This as now seen was also the fact in the Hewitt case. Secretary Vilas, speaking of this aspect of the Miller case, says:

"Meantime, whatever may have been the validity of the order of withdrawal, it was revoked on the 15th of August last. If I were bound to

regard Miller's homestead entry as irregular, because in conflict with the subsisting withdrawal at the time it was made, yet, inasmuch as that withdrawal has entirely ceased, and no objection remains in any right of the company, or otherwise, so far as known to the Department, to his taking this land, and, inasmuch as his settlement and long residence (assuming his claims in respect thereto will be established by final proofs) entitle him to equitable consideration, it would appear to be not an improper exercise of discretion to now direct the allowance of his application for a homestead entry."

That Congress recognizes and approves, in the disposal of public lands to actual settlers, the application of such equitable consideration, is apparent in section 2450 of the Revised Statutes, which is as follows:

"The Commissioner of the General Land Office is authorized to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be settled by the Secretary of the Interior, the Attorney General, and the Commissioner, conjointly, consistently with such principles, all cases of suspended entries of public lands and of suspended pre-emption land-claims, and to adjudge in what cases patents shall issue upon the same."

The Secretary, Attorney-General, and Commissioner made a series of rules to carry this act into effect. The 8th, 13th, and 19th provide for perfecting and patenting pre-emption entries as follows:

8. "Pre-emption entries allowed under one

pre-emption law, where it shall have been discovered that said entries are invalid under that act, but where the settlement and improvement is of a character to have entitled the parties to a legal and valid claim under a subsequent law, provided the land is not embraced by the valid claim of another."

13. "All bona fide entries on lands which had been once offered, but afterwards temporarily withdrawn from market, and then released from reservation, where such lands are not rightfully claimed by others."

19. "All entries made upon land appropriated by entry or selection, but which entry or selection was subsequently cancelled for illegality."

It would seem that the statute, and the regulations made under it, would well warrant the Secretary (Vilas) in the declaration that a settler's claim made inside a reservation could properly be perfected into a patent, after the reserve was cancelled, without forcing the claimant to go back and repeat all the preliminary steps which ordinarily precede a patent. Such equitable considerations would appear to be peculiarly strong in the case of Hewitt. He went on the land in good faith and put valuable improvements on it, filed the required declaratory statement and was given the ordinary receipt therefor. So far as disclosed by the record he had no notice of the alleged withdrawal until he came to make his final proof and pay for the premises. He prosecuted his claim to the best

of his ability and was still prosecuting it when the order revoking the alleged withdrawal was made.

V.

**That the Railroad Company never made a valid selection of the tract, the alleged selection was void, and the company has not now and never did have any title.**

The bulk selections, made by the Company March 19, 1883, was under a rule, *then existing*, that the Company must file with such list of selections a list of losses—"tract for tract."

This rule was modified—not abrogated— by the Teller circular of May 28, 1883,—70 days later.

But the Teller circular did not contemplate or provide for approving lists of selections until the matter of losses, upon which such selections were supposed to be based, had been fully investigated. If it had so provided, it would have been in derogation of the clear meaning and intention of the law. The Company could not initiate a selection, which would be a basis of any right, until it was duly ascertained that "some section or part of section" of equal area

had been lost to it by sale or otherwise in the granted limits. And before any right in any odd numbered section in the indemnity limits could attach in the Company, the fact that a similar loss had been sustained in the grant, ***must be ascertained under the direction of the Secretary***. Hence the Teller circular simply undertook to relieve the Company from gathering and listing losses which might be bases of its selections, and imposed the task upon the land officers. This is not an abrogation of the legal requirement that losses must precede selections "tract for tract". Such a ***selection***, and such only, is that contemplated by the law. The alleged selection of March 19, 1883, was merely a list made in bulk of all the odd numbered sections in the indemnity limits of that land district? Such a list made up and filed with the Register and Receiver was no selection whatever within either the provisions of the law—or the regulations. Neither was it a selection contemplated by the Teller circular. The language of this circular is:

"The Commissioner of the General Land Office.—Sir: It is my desire to open for setlement as speedily as possible all the lands within the indemnity limits of the grant to the Northern Pacific Railroad Company not actually required to supply the lands lost in place within the granted limits.

The grant should be adjusted at the earliest possible time, that the orders of withdrawal may be vacated without unreasonable delay as indicated in my letter of the 17th inst. The unparalelled demand for lands for actual settlement

by great numbers of persons, not only from foreign countries, but from the older states, seeking homes, under the settlement laws, along the line and within the vicinity of the Northern Pacific grant, requires for the best interest of the country and all parties concerned, that the withdrawal should not be maintained any longer than is actually necessary for the adjustment of the guaranteed right of the company.

In order to facilitate the work of making selections, I think you should instruct the local officers that, when clear lists of selections free from conflicts or other objections are filed with the district officers and approved by them, said selection should at once be marked on their books and forward for final examination, leaving the ascertainment of the lands lost in place to your office, instead of requiring preliminary lists of such lost lands together with the indemnity lands, 'tract for tract' from the company as heretofore.

I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

Very respectfully,

H. M. TELLER,

Secretary.

It is seen that the Secretary here uses the word "selections" in two distinct senses. In the phrase—"in order to facilitate the work of making selections, I think you should instruct", etc,, he clearly uses the word in the sense of embracing everything necessary to be done to pass the title to the company,—namely, the ascertaining of the losses in place, the listing of the corresponding tracts in the odd sections within the indemnity limits, and then determining that the

losses have actually occured and the listed indemnity lands are free from claims and correspond in acreage, and finally the approval of these by the Secretary.

But in the phrase "when clear lists of selections, free from conflict or other objection, are filed with the district officers and approved by them, said selections should at once be marked upon their books and forwarded for final examination," etc., the word is used in the sense of designating the tracts of lands sought to be acquired by the grantee. "Clear lists of selections" can mean nothing other than lists of tracts clear from claims. Again "said *selections* should at once be marked upon their books", means that the *listed tracts* should be so marked. It is gramatically and logically impossible that the word in the latter phrase should be synonymous with "selections" as contemplated in the law. The act says "other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior." This kind of selection requires the offices of both the Company and the Secretary. Until both have done their duty in that regard, there is no legal selection, and hence no rights have attached. And as we have seen in the decision of *Wisconsin Central Railroad vs Price Co.—supra,* it is no perfunctory duty that is imposed upon the Secretary in this regard. His required action is judicial. He must determine whether there were deficiencies in the grant, and whether the land selected by the company to meet such deficiency could be

properly taken. Hence, his approval "was essential to the efficacy of the selections, *and to give to the Company any title to the lands selected.*"

In the light of the foregoing. the so-called selections of March 19, 1883, were not selections at all. Tney were merely listing of odd sections in the indemnity limits without regard to whether they were already covered with legal claims, and without designating any losses. And this list was filed, and the certificate of the Register and Receiver secured thereto, in direct violation of the existing requirement of the Department. That the Department did require the Company, *at that time*, in order to initiate the proceeding of making selections under Section 3 of the grant, to file with the Register and Receiver preliminary lists of lands, lost in place together with the indemnity lands, tract for tract, is clearly evident by the Teller circular. As before stated, that circular is dated May 28, 1883, while the so-called bulk-selection was filed in the local land office March 19, 1883. In the last clause but one, the Commissioner of the General Land Office is directed to instruct the local officers that when clear lists of selections (tracts) are filed with them, such selections (tracts) shall be marked upon their books and forwarded to the Land Department for final examination "leaving the ascertainment of the lands lost in place in your (the Commissioner's) office, instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract *from the company as heretofore.*

It would seem that this conclusively proves that at the time the "bulk list" was filed and up to May 28, 1883, the company was required to couple with its list of proposed selections a list of equivalent losses, "tract for tract." And there is no attempt in the Teller circular to make its provisions retroactive. It does not relieve the local officers and the railroad company from the former requirements at any time preceding its date. Its language can only be construed as affecting the future acts of the parties named. If the company desired to take advantage of its terms it must file its lists at some date subsequent to the issue of the circular.

Defendants cite *St. Paul etc. R. R. Co. vs N. P. R. R. Co., 139 U. S. I, 19* as establishing the rule that if the total area of the lands in the indemnity limits are insufficient to satisfy the losses from the place limits the indemnity lands are appropriated without selection.

In the first place it does not appear by the record that the Company is entitled to all the indemnity lands, and furthermore the rule is not as contended.

The case cited was a contest between two *railroad companies* and the court determined that where the deficiency within the granted limits is so great that all the indemnity lands will not make good the loss, no formal selection was necessary to give them to the company having the older grant, *as against the other company.*

The case is distinguished in *U. vs Missouri etc. Railway, 141 U. S. 358, 376,* and held to have no application in a contest between an individual and a company claiming the land for indemnity purposes.

This distinction is also noted in *U. S. vs Cotton, Marble and Lime Co. 146 U. S, 615, 616,*

Nothing appears in the record bearing upon the question of the area of losses in the granted limits except the certificate dated May 2d, 1896, embraced in Finding VIII Rec. p. 53.

The certificate in question is not entitled to any weight as evidence, but if it were, it would not show that the company is entitled to all the indemnity lands to make good its losses in the primary limits. It does not purport to cover *all* the indemnity lands but only the "first indemnity limits," the second indemnity provided by the act of May 31, 1870, not being embraced in the certificate. It therefore does not appear that the company is entitled to all the indemnity lands even if that were in any way material.

Furthermore it has been held by the Department that there has been no official designation of the deficiency of the grant to the Company.

"The Northern Pacific is not entitled to invoke the protection of the order of May 28, 1883, waiving specification of loss, where it assigns an insufficient basis for a selection in the presence of a contest involving the right to enter the selected tract; nor can a subsequent assignment of

a sufficient basis avail the company as against the right of the contestant in such a case.

There has been no Departmental recognition of an ascertained deficiency in the Northern Pacific Grant; nor has the company been relieved, on account of such deficiency, from the specification of losses in making indemnity selections."

*N. P. R. R Co. v. Strieb, 26 L. D. 589.*

The company never acquired any right to the land as has been conclusively demonstrated. Defendants as the immediate grantees of the Company have no greater rights to the land than the Company, its grantor, had.

Plaintiff's patent when issued related back to the date of his entry November 2, 1882, upon which it was based, and the alleged selection of the Company having been made on March 19, 1883, plaintiff's rights under his patent are prior the initiation of all rights claimed by the Company on account of that alleged selection.

Defendants, therefore, are not in privity with the United States and cannot successfully attack plaintiff's patent, either at law or in equity. They cannot be heard to say the patent is void.

Defendants not having any rights to the land, plaintiff's patent is in any event good as against their attack. It is purely a question between the Government and Hewitt.

So if it should be determined that both plaintiff and defendant have no rights to the land in question the patent itself would still be good as

against defendants, and plaintiff must prevail in the action.

*New Dunderberg Min. Co., v Old (C. C. A.) 79 Fed, 598, 606.*

*Dewese v Reinhard, 19 U, S. App. 698, 706. 10 C. C.A. 55; 59, 60 and 61 Fed. 777, 781;*

*In Hartman v Warren, 40 U. S. App. 245, 22 C. C. A, 30 and 76 Fed. 157, 163,* the court says;

"In every other case cited by counsel for appellant, the equitable right to the land which prevailed over the legal title had been initiated by settlement upon or improvement of the land before the foundation of the claim which went to patent was laid. Under the preemption laws, settlement and improvement by a qualified preemptor gives him a right to be preferred in the purchase or other acquisition of the land, where the United States had determined to sell or dispose of it. *Sheply v. Cowan 91 U. S. 330.* In every case cited by counsel for appellant in which the equitable right to the land prevailed over the legal title the former had either been recognized by the United States by a grant or an entry of the land, or by the acceptance of payment for it, so that the equitable owner was in privity with the government, or the equitable right had been initiated before the claim which went to patent by a settlement or an improvement of the land under a law which gave to the settler or improver a right to be preferred in its acquisition. No authority has been cited which holds that one who is not in privity with the government, and who has never acquired any right to the land until after it was entered by the patentee, can maintain a bill to divest him of the legal title."

The case cited on behalf of defendants on page 36 of their brief relate to the determination of the priority of the rights of the parties, and simply reaffirms the well established rule that the land should be awarded to the party who has initiated the *prior* right thereto. There both parties have initiated rights or equities in the land in controversy. In the case at bar the company, defendant's grantor, has never initiated any rights whatsoever to the land.

On the other hand, in *Smelting Co. v. Kemp, 104 U. S. 630, 647,* Mr. Justice Field in delivering the opinion of the Supreme Court to the effect that a patent could not be successfully impeached either in an action at law, or a suit in equity unless the attacking party is in privity with the government said of the complainant:

"He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentees hands. *Roggs V. Mining Co., 14 Cal. 179, 353.* It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

For these reasons the judgment of the Su-

preme Court of North Dakota should be reversed and that of the District Court affirmed.

J. H. McGOWAN.
JAMES A. KELLOGG.
C. D. AUSTIN.
Attorneys for Plaintiff in Error.